Opfordring til at fremsætte bemærkninger til en statsstøtteforanstaltning efter artikel 1, stk. 2, i del I i protokol 3 til aftalen om Tilsynsmyndigheden og Domstolen, for så vidt angår den islandske havnelov

(2008/C 96/03)

Ved beslutning nr. 658/07/KOL af 12. december 2007, som er gengivet på det autentiske sprog efter dette resumé, indledte EFTA-Tilsynsmyndigheden en procedure i overensstemmelse med artikel 1, stk. 2, i del I af protokol 3 til aftalen mellem EFTA-staterne om oprettelse af en tilsynsmyndighed og en domstol, i det følgende benævnt »tilsyns- og domstolsaftalen«. De islandske myndigheder er blevet underrettet ved kopi af denne beslutning.

EFTA-Tilsynsmyndigheden giver hermed EFTA-staterne, EU-medlemsstaterne og interesserede parter en frist på en måned efter offentliggørelsen af denne meddelelse til at fremsende deres bemærkninger til den pågældende foranstaltning til:

EFTA-Tilsynsmyndigheden
Registreringskontoret
Rue Belliard 35
B-1040 Bruxelles

Bemærkningerne vil blive videresendt til de islandske myndigheder. Interesserede parter, der fremsætter bemærkninger til sagen, kan skriftligt anmode om at få deres navn hemmeligholdt. Anmodningen skal være begrundet.

SAMMENFATNING

SAGSFORLØB

Ved brev af 7. maj 2007 fra det islandske finansministerium anmeldte de islandske myndigheder i henhold til artikel 1, stk. 3, i del I i protokol 3 til tilsyns- og domstolsaftalen ændringer til den islandske havnelov med henblik på at lade den omfatte skadeserstatning for bådelifte. De anmeldte også en påtænkt anvendelse af denne nye bestemmelse til fordel for reparationen af bådeliften i havnen på Vestmannaøerne. Den seneste del af anmeldelsen blev trukket tilbage ved et brev af 11. december 2007 fra de islandske myndigheder.

Det islandske arbejdsgiverforbund (*Samtök atvinnulífsins*) indgav en klage til Tilsynsmyndigheden ved brev af 31. august 2007, hvori det hævdes, at de ekstra midler til fonden for havneforbedringer udgør statsstøtte. Klagen blev sendt til de islandske myndigheder for at få deres kommentar.

Efter en brevudveksling med de islandske myndigheder har Tilsynsmyndigheden besluttet at indlede en formel undersøgelsesprocedure med hensyn til de ændringer, der blev foretaget af den islandske havnelov i 2007, og bestemte aspekter af havneloven fra 2003, hvis vedtagelse ikke blev anmeldt til Tilsynsmyndigheden.

VURDERING AF FORANSTALTNINGEN

Ændringerne af havneloven i 2007

Den islandske havnelov er en rammelov, som bl.a. indeholder bestemmelser om de centrale myndigheders koordinering af havneanliggender, definitionen af en havn, ledelse og drift af havne, statsstøtte til havneanlæg og den såkaldte fond for havneforbedringer.

Ved denne anmeldelse underretter de islandske myndigheder Tilsynsmyndigheden om lov nr. 28/2007 om ændring af havneloven fra 2003. Det følger af ændringen, at bådelifte nu kan modtage skadeserstatning fra fonden for havneforbedringer i henhold til artikel 26, stk. 3, tredje afsnit i havneloven, hvilket før kun gjaldt andre havneanlæg. Bestemmelsen omfatter kun skader i havne, der ejes af kommunen. Privatejede havne eller skibsværfter kan ikke få skadeserstatning i henhold til havneloven fra 2007.

Tilsynsmyndigheden anser støtten for at være ydet ved hjælp af statsmidler, der kanaliseres gennem fonden for havneforbedring. Fonden for havneforbedring er et offentligt organ, som delvist finansieres direkte over statsbudgettet, og som tjener offentlige formål. Tilsynsmyndigheden betragter driften af en bådelift til reparation af skibe som en økonomisk aktivitet. De kommunale ejere fungerer derfor som en virksomhed i

henhold til artikel 61, stk. 1, i EØS-aftalen. Foranstaltningen er selektiv, fordi kun virksomheder i en bestemt sektor (havne) og inden for denne sektor kun visse havne tilgodeses. Tilsynsmyndigheden anser bådelifte, andre skibshejseanordninger og tørdokker for at være i international konkurrence, og støtten fordrejer eller truer med at fordreje konkurrencevilkårene og påvirke samhandelen mellem de kontraherende parter inden for EØS-området.

Eftersom havneloven trådte i kraft i marts 2007, dvs. inden den blev anmeldt til Tilsynsmyndigheden, er standstillforpligtelsen i artikel 1, stk. 2, i del I i protokol 3 til tilsyns- og domstolsaftalen blevet tilsidesat, og foranstaltningen kan betragtes som ulovlig støtte i henhold til artikel 1, litra f), i del II i protokol 3 til samme aftale. Støtte, der er udbetalt i henhold til den bestemmelse, der undersøges, og som viser sig at være uforenelig med EØS-aftalens statsstøttebestemmelser, vil blive krævet tilbagebetalt på Tilsynsmyndighedens påbud.

Det er Tilsynsmyndighedens umiddelbare opfattelse, at støtten ikke er forenelig med EØS-aftalen, eftersom den ikke berettiger til en undtagelse i medfør af artikel 61, stk. 2, litra b), eller artikel 61, stk. 3, i EØS-aftalen. Bestemmelsen om skadeserstatning er ikke begrænset til situationer, hvor skaden skyldes naturkatastrofer eller usædvanlige hændelser, og har derfor ikke hjemmel i artikel 61, stk. 2, litra b), i EØS-aftalen. Artikel 61, stk. 3, litra c), sammenholdt med retningslinjerne for skibsbygning tillader ikke driftsstøtte, men kun investeringsstøtte, hvis denne ydes for at opgradere eller modernisere eksisterende værfter med henblik på større produktivitet. Dette er ikke tilfælde her, eftersom de islandske myndigheder udtrykkeligt hævder, at formålet med den pågældende støtte ikke var at modernisere. Skadeserstatning skal under alle omstændigheder klassificeres som driftsstøtte.

Tilsynsmyndigheden har også noteret sig, at skadeserstatning kun ydes til offentligt ejede havne. Tilsynsmyndigheden ser i øjeblikket ingen god grund til, at privatejede havne tilsyneladende diskrimineres.

Tilsynsmyndigheden er derfor i tvivl om, hvorvidt ændringerne af havneloven fra 2007 er forenelige med EØS-aftalen.

Havneloven fra 2003

I 2003 ændrede en ny havnelov bestemmelserne for statsstøtte til havneanlæg. Bestemmelserne gav mulighed for, at finansministeriet betalte for visse havneanlæg (artikel 24), og for at fonden for havneforbedring kunne yde skadeserstatning for visse af disse anlæg (lovens artikel 26).

Tilsynsmyndigheden er af den opfattelse, at nogle af de projekter, der henvises til i artikel 24, stk. 2, måske — i overensstemmelse med Europa-Kommissionens meddelelse om bedre tjenesteydelseskvalitet i søhavne — kan betegnes som almene infrastrukturforanstaltninger og derfor ikke udgør statsstøtte ifølge artikel 61, stk. 1, i EØS-aftalen. Dette gælder støtte til bølgebryderanlæg, afmærkning af indsejlingsrender, dybde, beskyttelsesanlæg og uddybningsområder. Tilsynsmyndigheden vil dog se nærmere på, om denne klassificering også gælder anvendelsen af lodsbåde i havne, hvor de naturlige betingelser er vanskelige, og støtte til kajanlæg.

Den støtte, der ydes efter skadeserstatningsbestemmelsen i artikel 26, stk. 3, nr. 3, i havneloven fra 2003, indebærer statsstøtte, for så vidt som den vedrører projekter, der ikke udgør almen infrastruktur.

Tilsynsmyndigheden betragter havneloven fra 2003, som ikke blev anmeldt til Tilsynsmyndigheden, som ulovlig støtte i henhold til artikel 1, litra f), i del II i protokol 3 til tilsyns- og domstolsaftalen. Støtte, der er udbetalt i henhold denne bestemmelse, og som er uforenelig med EØS-aftalens statsstøttebestemmelser, vil blive krævet tilbagebetalt på Tilsynsmyndighedens påbud.

Tilsynsmyndigheden vil undersøge, om statsstøtteforanstaltningerne har hjemmel i artikel 61, stk. 3, litra c), i EØS-aftalen enten sammenholdt med henholdsvis retningslinjerne for skibsbygning eller retningslinjerne for regionalstøtte eller direkte. Det bør bemærkes, at alle ovenstående foranstaltninger kun tilgodeser offentligt ejede havne. Ifølge Tilsynsmyndigheden har denne forskelsbehandling ingen berettigelse. På grundlag af ovenstående er Tilsynsmyndigheden i tvivl om, hvorvidt støtten er forenelig med EØS-aftalens statsstøttebestemmelser.

KONKLUSION

I lyset af ovenstående betragtninger har Tilsynsmyndigheden besluttet at indlede en formel undersøgelsesprocedure i overensstemmelse med artikel 1, stk. 2, i EØS-aftalen med hensyn til ændringerne af havneloven i 2007 og ændringerne af havneloven i 2003.

EFTA SURVEILLANCE AUTHORITY DECISION

No 658/07/COL

of 12 December 2007

to initiate the procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the Icelandic Harbour Act

(Iceland)

THE EFTA SURVEILLANCE AUTHORITY [1],

Having regard to the Agreement on the European Economic Area [2], in particular Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [3], in particular Article 24 thereof,

Having regard to Article 1(2) of Part I and Articles 4(4) and 6 of Part II of Protocol 3 to the Surveillance and Court Agreement,

Having regard to the Authority's Guidelines [4] on the application and interpretation of Articles 61 and 62 of the EEA Agreement, in particular the Chapter on State aid to Shipbuilding and the Chapter on National Regional Aid,

Having regard to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 to the Surveillance and Court Agreement,

Whereas:

I. FACTS

1. Procedure

By letter dated 7 May 2007 from the Icelandic Ministry of Finance, forwarded by the Icelandic Mission to the EU, received and registered by the Authority on the same date (Event No 420581), the Icelandic authorities notified, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, amendments to the Icelandic Harbour Act, with a view to including damage compensation for ship lifts. They also notified an envisaged application of that new provision in support of the repair of the Westman Islands Port ship lift facility.

By letter dated 14 May 2007 (Event No 421158), the Authority informed the Icelandic authorities that it considered the notification to be incomplete as, in particular, the notification form had not been submitted.

On 19 June 2007, the Icelandic Mission to the EU forwarded a letter from the Icelandic Ministry of Finance, received and registered by the Authority on the same date (Event No 425880), by which the Icelandic authorities submitted the notification form and provided further information on the notified measures.

By letter dated 4 July 2007 (Event No 427442), the Authority requested additional information, which the Icelandic authorities provided on 10 August 2007 (Event No 433162).

The Confederation of Icelandic Employers (*Samtök atvinnulífsins*) filed a complaint with the Authority by way of a letter dated 31 August 2007, claiming that the additional funding for the Harbour Improvement Fund constitutes State aid which cannot be justified under the EEA State aid provisions. The Association refers, in particular, to the fact that aid under the Harbour Act is only available to publicly owned, but not to privately owned, harbours.

By letter dated 19 September 2007 (Event No 441678), the Authority forwarded the above complaint to the Icelandic authorities for comment and requested further information, which was provided by the Icelandic authorities in a letter from the Icelandic Ministry of Finance dated 16 October 2007 (Event No 447362). The case was discussed with the Icelandic authorities during the package meeting between the Icelandic authorities and the Authority of 29 October 2007.

By letter dated 11 December 2007 (Event No 456952), the Icelandic authorities withdrew the notification relating to the proposed application of the Harbour Act in support of the repair of the Westman Islands Port ship lift facility.

2. Description of the proposed measures

In order to deal with the amendments to the Harbour Act as notified in 2007, which provide, for the first time, for damage compensation in favour of ship lifts, the Authority finds it appropriate to set the Harbour Act in its historical context.

2.1. *History of the Icelandic Harbour Act*

The Icelandic Harbour Act is a general framework legislation containing *inter alia* provisions on the coordination of harbour affairs by central authorities, the definition of what constitutes a harbour, the management and operation of harbours, State contributions to harbour constructions and the so-called Harbour Improvement Fund.

The 1984 Harbour Act

The Harbour Act No 69/1984 contained a provision authorising damage compensation for harbour facilities in Article 32(2). That provision stipulated that a so-called Harbour Improvement Fund was authorised to indemnify loss to harbour constructions which had sustained damage caused by '*acts of God or natural catastrophes or force majeure, including loss which is not fully indemnified on account of provisions of Section IX of the Maritime Act on limited liability of operators of vessels*'.

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[1] Hereinafter referred to as 'the Authority'.
[2] Hereinafter referred to as 'the EEA Agreement'.
[3] Hereinafter referred to as 'the Surveillance and Court Agreement'.
[4] Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, EEA Supplement No 32, 3 September 1994. The Guidelines were last amended on 31 May 2007. Hereinafter referred to as 'the State Aid Guidelines'.

According to its Article 8, the Act only covered municipal harbours, so public aid in the form of damage compensation under Article 32(2) was only given to harbours owned by municipalities.

The 1994 Harbour Act

In 1994, a new Harbour Act No 23/1994 was adopted, which was subsequently amended by Act No 7/1996. Article 19 of the 1994 Harbour Act listed seven categories of harbour construction project which could receive State support (e.g. constructions at wharfs, piers, berths, traffic lanes within the limits of harbour constructions, etc.). That support would come directly from the State Treasury. The State would pay up to 100 % for the costs of primary research, up to 90 % of investment costs for the constructions of quays, dredging of harbours and entrance, navigation signals and special outfits for ro-ro vessels and ferries, and up to 60 % in relation to the remaining categories.

In addition, Article 28(2) of the 1994 Harbour Act contained the same damage compensation for harbour constructions, granted by the Harbour Improvement Fund, as had been included in the 1984 Act. As before, the 1994 Harbour Act only covered municipal harbours, cf. Article 3 of the Act, and therefore State support was still limited to harbours owned by municipalities.

Some provisions of the 1994 Harbour Act, namely the provisions on State grants for the financing of harbour constructions for ships ([1]), were the subject of a decision of the EFTA Surveillance Authority dated 19 March 1997 (Decision No 51/97/COL). In line with that Decision, the Icelandic authorities had agreed not to apply the provisions in question without prior notification to and approval by the EFTA Surveillance Authority.

The 2003 Harbour Act

In 2003, a new Harbour Act No 61/2003 was adopted. This Harbour Act, which was not notified to the Authority, contained changes in particular with regard to the permissible operating forms of harbours and, hence, which harbours come within the Act. Article 8 provided that:

'A harbour may be operated as:

1. *A harbour that is owned by a municipality without any special board of directors.*

2. *A harbour owned by a municipality and governed by a special board of directors.*

3. *A public limited liability company, irrespective of whether or not it is owned by a public body, a private limited liability company, a partnership or as a private party operating independently. Harbours operated under this paragraph are not regarded being a public operation.'*

In other words, the Harbour Act now applied to harbours other than those owned by the municipalities and specifically envisaged the existence of privately owned harbours, although a distinction was maintained in that the latter would not be considered as a 'public operation' under the Act.

According to Article 24(1) of the Harbour Act, contributions from the Treasury could be granted to projects relating to harbour constructions carried out by harbours which are operated under subparagraph 1 or 2 of Article 8. In other words, privately owned harbours could not receive any State support under the Harbour Act. Public entities (including municipalities) would also not be entitled to any support if they organised their harbour as a limited liability company or any other form of organisation listed in subparagraph 3 of Article 8.

Article 24(2) now contained only three (instead of the former seven) categories of project for which direct aid can be given:

(a) For the reconstruction, improvement and repair of breakwaters in harbours where difficult natural conditions mean that there is little protection from ocean waves, for dredging in harbour approaches where regular dredging is needed (i.e. at least every five years), and for initial costs for pilot vessels in places where conditions in and near the harbour require such safety equipment. The level of State funding is determined in the National Transport Plan and may not exceed 75 %.

(b) Projects undertaken by small harbour funds within a region defined pursuant to the regional aid map for Iceland ([2]), with an income under ISK 20 million and where the value of the average catch over the past three years is under ISK 600 million. The projects to be supported should be limited to the marking of approach channels, depth, protective installations and quays. The level of State funding is determined in the National Transport Plan and may not exceed 90 %.

(c) Projects undertaken by a harbour fund within a region defined pursuant to the regional aid map for Iceland, with an income under ISK 40 million and where the value of the average catch over the past three years is under ISK 1 500 million and goods transportation through the harbour is less than 50 000 tonnes per year. State contributions pursuant to this subparagraph may never exceed 60 % for dredging and 40 % for quay installations on which work is performed in 2007 or later.

Article 26(3), subparagraph 3, of the Harbour Act contained a damage compensation clause which stipulated that the Harbour Improvement Fund is authorised to indemnify loss to harbour constructions which qualify for support under subparagraphs (a) or (b) of Article 24(2) or loss to dry harbour constructions, including loss which will not be fully indemnified from the Emergency Fund (*Viðlagasjóði*) ([3]) or due to the provisions of Section IX of the Maritime Act on limited liability of operators of vessels.

([1]) The investments concerned in particular docking facilities for ship repair contained in Article 24(6) of the 1994 Act.

([2]) EFTA Surveillance Authority Decision of 8 August 2001 on the map of assisted areas and levels of aid in Iceland (Aid No 00-002).

([3]) A fund different from the Icelandic Harbour Improvement Fund and responsible for covering damage from natural catastrophes.

Compared to the 1994 Harbour Act, the provision limits the number of aid beneficiaries by linking the support to categories (a) and (b) in Article 24(2). On the other hand, while still referring to the Emergency Fund, the text no longer refers to compensation limited to damage caused by natural disasters or acts of God.

According to information provided by the Icelandic authorities, no State support has been paid out under this measure so far. This would appear to be as a result of interim provision II of the 2003 Harbour Act, as amended by Act No 11/2006, under which State aid might still be provided, until the end of 2008, in accordance with the rules in the 1994 Harbour Act.

The 2007 amendment Act

By the present notification, the Icelandic authorities inform the Authority of Act No 28/2007, amending the 2003 Harbour Act, and in particular Article 26(3), subparagraph 3 thereof. According to that Article, as now amended, ship lifts can now also receive damage compensation from the Harbour Improvement Fund. The wording '*eða tjón á upptökumannvirkjum*' is added after the reference to Article 24. As explained by the Icelandic authorities, '*upptökumannvirki*' includes dry docks, ship lifts and ship hoists.

According to information provided by the Icelandic authorities, the ship lifts are to be used mainly for ship repair and conversion works, not for the construction of ships.

There are currently 15 ship lifts spread around the country, 12 of which are owned by municipalities. The ship lift ownership does not imply that the concrete repair works are also carried out by the harbours. Normally, the repair works on the ships are carried out by a company which pays the harbour for the use of the ship lift.

2.2. ***The objective of the measures***

The above-mentioned amendment to Article 26 of the Harbour Act was not in the bill as originally submitted to Alþingi but was added by the Transport Committee. In the opinion of the Committee, it was considered logical that damage to ship lifts could be compensated on the same basis as other harbour constructions that had benefited from State contributions by way of damage compensation. As stated in a translation submitted by the Icelandic authorities on the Committee bill, 'the authorisation only applies to damage compensation to shipyard facilities ([1]) which were constructed with State aid'. The Committee further emphasised that the provision only covered damage to facilities owned by public bodies. The amount of the compensation was to be limited to the reconstruction value. Consequently, it would not be permissible to grant compensation to build a lift with more capacity than that of the damaged facility ([2]).

As indicated by the complainant and confirmed by the Icelandic authorities, the clause is no longer limited to compensation for damage caused by natural disasters or other special occurrences.

([1]) To be understood as ship lifts and hoists.

([2]) Item 3 of the opinion of the Committee (*Nefndarálit um frv. til l. um breyt. á hafnalögum, nr. 61/2003, þskj. 997-366. mál*).

2.3. ***National legal basis for the measure/recipients of the support***

The national legal basis for the measure is Article 26(3), subparagraph 3, of the Harbour Act, as amended by Article 7 of Act No 28/2007, which entered into force on 29 March 2007. That provision covers damage compensation for ship lifts, dry docks and ship hoists in addition to what was already covered. Iceland has not indicated how many ship lifts, etc. could potentially receive support under that provision. But as can be seen from above, currently there are 15 ship lifts in the country, 12 of which are owned by municipalities.

2.4. ***Budget and duration***

The Icelandic authorities stated that Parliament decided to increase the funding of the Harbour Improvement Fund for the year 2008 by ISK 200 million.

3. Comments by the Icelandic authorities

The Icelandic authorities only notify the amendment for legal certainty as they consider the measure not to constitute State aid within the meaning of Article 61(1) of the EEA Agreement. According to the notification form, the Icelandic authorities do not consider that the measure confers any advantages on the aid recipient(s) or distorts competition or affects trade between the Contracting Parties.

II. ASSESSMENT

1. The presence of State aid

State aid within the meaning of Article 61(1) of the EEA Agreement

Article 61(1) of the EEA Agreement reads as follows:

> *'Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'*

The criteria will be assessed below, first in relation to the notified amendments to the Harbour Act and second in relation to the 2003 Harbour Act, which was never notified to the Authority.

1.1. ***The notified amendments made to the Harbour Act in 2007***

1.1.1. *Presence of State resources*

The aid measure must be granted by the State or through State resources. The damage compensation for ship lifts in Article 26(3) subparagraph 3 of the Harbour Act, as amended by Act No 28/2007, is granted by the Harbour Improvement Fund, which for that purpose received a budgetary allocation of ISK 200 million from the Treasury. The budgetary allocation constitutes State resources.

This classification as State resources is not altered by the fact that the money is channelled through the Harbour Improvement Fund.

Article 26(1) of the Harbour Act states that the Harbour Improvement Fund is owned by the State and that the Harbour Council (*hafnaráð*) acts as its board of directors on behalf of the Minister of Transport. The Harbour Council is appointed by the Minister of Transport pursuant to Article 4 of Act No 7/1996 on the Maritime Agency (*lög um Siglingastofnun Íslands*). Accordingly, the Harbour Improvement Fund is a public law body. Part of the financing of the Fund comes directly from the State budget as decided by Parliament. According to Article 26(3) the Harbour Council disposes of the income of the Fund, following recommendations from the Maritime Agency and subject to the approval of the Minister of Transport, as further laid down in subparagraphs 1 to 3. The Maritime Agency is responsible for the administration of the Fund according to paragraph 4 of that Article. The Harbour Improvement Fund carries out public tasks as laid down in the Harbour Act. The Authority therefore takes the preliminary view that support granted by the Harbour Improvement Fund is imputable to the State ([1]) and constitutes State resources within the meaning of Article 61(1) of the EEA Agreement.

1.1.2. *Favouring certain undertakings or the production of certain goods*

The Authority considers the ownership of a ship lift which is rented out for ship repairs by a publicly owned harbour to constitute an economic activity and therefore that the municipal owners act as undertakings within the meaning of Article 61(1) of the EEA Agreement.

Further, the aid measure must confer on the recipients advantages that relieve them of charges that are normally borne from their budget. Such advantages exist as the owners of ship lifts, etc. can receive State support for repair of damage to facilities. Normally such costs would have to be borne by the ship lift owners from their own budget. The aid measure must be selective in that it favours '*certain undertakings or the production of certain goods*'. The measure is selective as it applies only to undertakings owning ship lifts, etc. falling within the definition of Article 26(3) subparagraph 3 of the Act. In this regard it cannot be argued that no selectivity exists because the owners of other harbour constructions are likewise entitled to receive State support under Article 26(3) subparagraph 3 of the Act. Even if the circle of beneficiaries is wider than owners of ship lifts, the advantages are only conferred to a certain, limited, group of undertakings, as will be demonstrated below.

Firstly, the damage compensation in Article 26(3) subparagraph 3 is limited to those projects which were constructed with State aid as outlined in the opinion of the Committee as referred to above (Section I-2.2). Hence, the provision on the damage compensation does not apply to all undertakings owning harbour constructions.

([1]) See Case C-482/99, *French Republic* v *Commission of the European Communities*, paragraphs 50 *et seq.*, [2002] ECR I-4397.

Secondly, an advantage also exists with regard to undertakings in other sectors which have to cover damages to their production facilities from their own budget. In this regard it is irrelevant that the support is only granted to compensate for the damage caused, without leading to a modernisation or an increase in capacity. Since owners of harbour facilities not having received State support before or in other sectors would not receive any damage compensation, the recipients of the support measure are in a better position with regard to repair than those undertakings having to finance the repair work from their own budget.

The Authority takes the preliminary view that support for ship lifts does not qualify as general infrastructure, the financing of which would not constitute State aid within the meaning of Article 61(1) of the EEA Agreement. As stated in the Commission's Communication on Reinforcing the Quality in Sea Ports ([2]), shipyards are considered as user-specific infrastructure and not as a general infrastructure measure. In the Authority's view the same applies to ship lifts used by or rented out by shipyards and harbours for repair work, which is normally a commercial activity and therefore benefits specific undertakings.

1.1.3. *Distortion of competition and effect on trade between Contracting Parties*

For a measure to qualify as aid it must distort competition and affect trade between the Contracting Parties. Ship lifts, ship hoists and dry docks as ship repair facilities are in international competition. In addition, the market for port services has been gradually opened to competition ([3]). The Commission pointed out in its LeaderSHIP 2015 programme that commercial shipbuilding and ship repair operate in a truly global market with exposure to world-wide competition ([4]). As the measure will strengthen the recipients' position in relation to other competitors within the area of the EEA, the damage compensation distorts or threatens to distort competition and affects trade between the Contracting Parties.

1.2. ***The 2003 Harbour Act***

In 2003, Act No 61/2003 replaced Act No 23/1994. In the new Harbour Act, the provisions on State funding of harbour constructions were changed. As outlined above, the current provisions provide for two distinct measures, namely payments by the Treasury in relation to certain harbour constructions (Article 24) and damage compensation granted by the Harbour Improvement Fund (Article 26 of the Act) for facilities covered by Article 24(2)(a) and (b) of the Act.

([2]) Communication from the Commission to the European Parliament and the Council, Reinforcing Quality Service in Sea Ports; A Key for European Transport, COM(2001) 35 final, Section 3.3. Hereinafter referred to as 'the Port Communication'.

([3]) Port Communication, cited in fn. 12, Section 2.

([4]) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, LeaderSHIP 2015, Defining the Future of the European Shipbuilding and Repair Industry, Competitiveness through Excellence, COM(2003) 717 final, Section 2.1.

1.2.1. *Presence of State resources*

Support directly from the Treasury, as referred to in Article 24 of the 2003 Harbour Act, constitutes budgetary allocations which qualify as State resources within the meaning of Article 61(1) of the EEA Agreement.

As outlined above, the support by the Harbour Improvement Fund for damage compensation to harbour constructions constitutes State resources (see above, Section II-1.1.1 of this Decision).

1.2.2. *Favouring certain undertakings or the production of certain goods*

While an advantage is conferred on the recipients by relieving them of costs which they would otherwise have to bear, it needs to be examined whether all the support measures under the Act are selective.

This would not be the case, if certain of the support measures can be classified as financing general infrastructure. Investments in such infrastructure are normally general measures, being expenditure incurred by the State in the framework of its responsibilities for planning and developing a transport system in the interest of the general public, provided the infrastructure is *de jure* and *de facto* open to all users. According to the Port Communication, public (general) infrastructure is characterised as being open to all users on a non-discriminatory basis. General infrastructure includes maritime access and maintenance, covering dikes, breakwater, locks and other high water protection measures, navigable channels, dredging and ice breaking navigation aid, lights, buoys, beacons, floating pontoon ramps in tidal areas, etc. Further, it includes public land transport facilities within the port area, short connecting links to the national transport networks or TENs and infrastructure up to the terminal site ([1]).

Article 24(2)(a), (b) and (c) of the 2003 Harbour Act are limited to the support of breakwater constructions, marking of approach channels, depth, protective installations and dredging. In line with the above examples given in the Communication, the Authority considers these measures to be general infrastructure which do not confer an advantage on the harbours, but are open to all users.

The use of pilot vessels in Article 24(2)(a) of the 2003 Harbour Act

The Authority, however, questions whether the use of pilot vessels in places where conditions require safety equipment, see Article 24(2)(a) of the Harbour Act, can be considered as infrastructure and will investigate that further during the formal investigation procedure. As the Port Communication cited above states '*public support to investments in mobile assets and operational services, e.g. those of individual port service providers, generally favour certain undertakings and it is difficult to foresee a situation where this is not the case*' ([2]). On the basis of the information available to it, the Authority cannot exclude that pilot vessels do not qualify as general infrastructure.

Support for quay installations in Article 24(2)(b) and (c) of the 2003 Harbour Act

On the basis of the information available to it, the Authority cannot judge whether support to quay installations qualifies as State aid or concerns a general infrastructure measure. In this regard, reference is made to Section 3.3 of the Port Communication which states that no general conclusions can be drawn for quay walls. The Icelandic authorities are requested to provide more information in this regard.

The damage compensation clause in Article 26(3) subparagraph 3 of the 2003 Harbour Act

The Authority considers that the damage compensation provided for in Article 26(3) subparagraph 3 of the Harbour Act is a measure conferring an advantage on the recipient, as normally such damage would have to be made good using funds from the undertaking's own budget.

However, as far as the damage compensation clause, which refers to Article 24(2)(a) and (b) of the Act, concerns infrastructure projects, it does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement. Where projects mentioned in Article 24(2)(a) and (b) might be considered as selective measures, the damage compensation clause would also be judged as selective in this regard. Based on the above considerations, it would appear that only damage compensation in respect of pilot vessels and quay installations may be caught.

1.2.3. *Distortion of competition and effect on trade between Contracting Parties*

The support strengthens the position of the recipients in relation to other EEA competitors, who compete with them on an international market. The support under the 2003 Harbour Act therefore distorts or threatens to distort competition and affects trade between the Contracting Parties.

1.3. ***Conclusion***

The Authority takes the preliminary view that the notified amendments made to the Harbour Act in 2007 to include ship lifts in the damage compensation clause in Article 26(3) subparagraph 3 of the Act constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

Under the 2003 Harbour Act, the support for breakwater constructions, dredging, the marking of approach channels, depth, and protective installations do not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

On the basis of the information available to it, support for the use of pilot vessels referred to in Article 24(2)(a) and support for quay installations provided for in Article 24(2)(b) and (c) would appear not to fall clearly into the category of general infrastructure and must therefore be regarded as State aid within the meaning of Article 61(1) of the EEA Agreement.

The damage compensation clause in Article 26(3) subparagraph 3 constitute State aid within the meaning of Article 61(1) of the EEA Agreement, in so far as it applies to projects which do not qualify as general infrastructure.

([1]) See Communication.
([2]) See Communication, Section 3.3 at the end.

2. **Procedural requirements**

Pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, *'the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. […]. The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision'*.

Where the final decision of the Authority is negative, i.e. the aid is found to be incompatible with the functioning of the EEA Agreement, any aid paid out in breach of the standstill obligation in Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement will be subject to a recovery order by the Authority.

2.1. ***Act No 28/2007 amending the Harbour Act***

The amendment to the Harbour Act is already law as Act No 28/2007 entered into force on 29 March 2007, thereby enabling the Harbour Improvement Fund to use State funds for damage compensation in favour of ship lifts. The Authority therefore concludes that in relation to this measure the standstill obligation has not been respected. The measure is consequently to be regarded as unlawful aid within the meaning of Article 1(f) of Part I of Protocol 3 to the Surveillance and Court Agreement and any aid paid out under that provision could be subject to recovery.

2.2. ***The 2003 Harbour Act***

The 2003 Harbour Act has not been notified to the Authority. The 1994 Harbour Act, which that Act replaced, was the subject of an appropriate measures proposal by the Authority in its Decision No 51/97/COL and was authorised on the condition that individual projects would be notified. It will now have to be assessed whether the amendments in the 2003 Harbour Act, in so far as they constitute State aid within the meaning of Article 61(1) of the EEA Agreement, must be treated as new aid within the meaning of Article 1(c) of Part II of Protocol 3 to the Surveillance and Court Agreement.

In this respect, the support for the use of pilot vessels and for quay installations, together with the damage compensation for those facilities, must be examined.

According to Article 4 of the Authority's Decision No 195/04/COL, a purely formal or administrative change does not affect the status of existing aid. However, a tightening of the criteria for the application of an authorised aid scheme, a reduction in aid intensity or a reduction of eligible expenses, qualify as new aid (Article 4(2)(c)). In its ruling in *Namur-Les Assurances*, the Court of Justice held that '[…] *the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it*' ([1]).

([1]) Case C-44/93, *Namur-Les Assurances du Crédit SA*, [1994] ECR I-3829, paragraph 28.

The use of pilot vessels referred to in Article 24(2)(a) of the 2003 Harbour Act

Article 24(2)(a) of the 2003 Harbour Act introduces a new support category, namely support for pilot vessels in places where conditions in and near the harbour require such safety equipment. The introduction of a new aid category constitutes new aid within the meaning of Article 1(c) of Part II of Protocol 3 to the Surveillance and Court Agreement. The Authority therefore concludes that in relation to this measure the standstill obligation has not been respected. The measure is consequently to be regarded as unlawful aid within the meaning of Article 1(f) of Part I of Protocol 3 to the Surveillance and Court Agreement and any aid paid out under that provision would be subject to recovery.

Quay installations referred to in Article 24(2)(b) and (c) of the 2003 Harbour Act

The support for quay installations was already contained in the 1994 Harbour Act (Article 19(1), number 2, provided for the support of wharfs, piers and berths. The support for quays and quay installations in Article 24(2)(b) and (c) of the 2003 Harbour Act is now limited to projects of a certain dimension and within certain defined regions. This indicates that the possibilities for granting aid have been reduced. However, as can be seen from Article 4 of the Authority's Decision No 195/04/COL, a tightening of aid criteria is to be considered as new aid. The Authority therefore concludes that in relation to this measure the standstill obligation has not been respected. The measure is consequently to be regarded as unlawful aid within the meaning of Article 1(f) of Part I of Protocol 3 to the Surveillance and Court Agreement and any aid paid out under that provision would be subject to recovery.

Damage compensation under Article 26(3), subparagraph 3, of the 2003 Harbour Act

The Authority notes that the damage compensation in the 2003 Harbour Act differs from the damage clauses in the 1984 and 1994 Acts in so far as it is no longer limited to support for damages caused by acts of God or natural catastrophes. With respect to this change, the Icelandic authorities have confirmed that, indeed, it was not the intention of the legislator to limit damage compensation to natural disasters or exceptional occurrences. The Authority finds that the extension of the damage compensation clause to cover a broader range of circumstances constitutes new aid within the meaning of Article 1(c) of Part II of Protocol 3 to the Surveillance and Court Agreement. The Authority therefore concludes that in relation to this measure the standstill obligation has not been respected. The measure is consequently to be regarded as unlawful aid within the meaning of Article 1(f) of Part I of Protocol 3 to the Surveillance and Court Agreement and any aid paid out under that provision would be subject to recovery.

3. **Compatibility of the aid**

3.1. ***Act No 28/2007 amending the Harbour Act***

Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation under Article 61(2) or (3) of the EEA Agreement.

The derogation in Article 61(2) of the EEA Agreement is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. The Authority notes, in particular, that the damage compensation to ship lifts provided for in Article 26(3), subparagraph 3, of the 2007 Harbour Act is no longer limited to natural disaster or exceptional occurrence. It therefore cannot be based on Article 61(2)(b) of the EEA Agreement.

The aid is not given to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Iceland, therefore Article 61(3)(b) of the EEA Agreement does not apply.

The aid in question is not linked to any investment, but compensates recipients for a given damage. It reduces the costs which companies would normally have to bear in the course of pursuing their day-to-day business activities and is consequently to be classified as operating aid. Operating aid is normally not considered suitable to facilitate the development of certain economic activities or of certain regions as provided for in Article 61(3)(c) of the EEA Agreement, unless it is specifically envisaged by the Authority's Guidelines, which is not the case here.

An application of the Regional Aid Guidelines in this regard does not appear possible. It would appear that the notified measure falls to be assessed under the Authority's Guidelines on Shipbuilding which, as a *lex specialis*, preclude the application of the regional aid chapter of the Guidelines ([1]). The Shipbuilding Guidelines cover aid to '*any shipyard, related entity, ship owner and third party, which is granted, whether directly or indirectly, for building, repair or conversion of ships*'. As can be seen from the Commission's case practice, aid for the construction or extension of ship lifts is considered to be a measure falling under the Shipbuilding Guidelines ([2]). According to point 26 of the Guidelines investment aid — not operating aid — can only be granted if it is linked to upgrading or modernising existing yards with a view to improving productivity and is limited to 22,5 % or 12,5 % aid intensity thresholds. The Icelandic authorities explicitly state, in any event, that no modernisation is allowed. They also aim for higher aid intensities than the specified thresholds.

Only if the Shipbuilding Guidelines do not apply, can the possibility of support under the Authority's Regional Aid Guidelines be assessed. The aid qualifies as operating aid ([3]), which would have to be assessed under Section 5 of the Guidelines. Such aid must normally be temporary and reduced over time (Section 5(68) of the Regional Aid Guidelines), or granted for least populated regions (Section 5(69) of the Regional Aid Guidelines) or granted for offsetting additional transport costs (Section 5(70) of the Regional Aid Guidelines). On the basis of the information available, the Authority cannot see that envisaged support for damage compensation for ship lifts is limited in that respect.

Given that on the basis of the available information, one or the other of these chapters applies to the measures under examination, a direct application of Article 61(3)(c) of the EEA Agreement is precluded.

The Icelandic authorities do not argue that the harbour services constitute a public service under Article 59(2) of the EEA Agreement.

Even if the aid could be authorised under the EEA State aid provisions, the Authority still is in doubt of the compatibility of the measures with the functioning of the EEA Agreement. The damage compensation is only granted to publicly owned harbours. The Icelandic authorities state that the Harbour Act allows for different operating forms of harbours and therefore different rules apply to the different harbour types. This was one of the primary purposes of the 2003 Harbour Act and the Icelandic authorities do not consider this distinction to be incompatible with the State aid provisions. The Authority has doubts as to how such a difference in treatment between publicly and privately owned harbours can be justified.

On the basis of the foregoing considerations, the Authority has doubts as to whether the amendments to the Harbour Act made in 2007 can be regarded as compatible with the functioning of the EEA Agreement.

3.2. ***The 2003 Harbour Act***

During the formal investigation procedure, the Authority will investigate whether the newly introduced support for pilot vessels and for quay installations can, to the extent that it is found to constitute aid, be justified under Article 61(3)(c) of the EEA Agreement.

Pilot vessels

The support for pilot vessels would qualify as operating aid, falls to be assessed under Section 5 of the Authority's Regional Aid Guidelines. As noted above, such aid would normally be temporary and reduced over time (Section 5(68) of the Regional Aid Guidelines), or granted for least populated regions (Section 5(69) of the Regional Aid Guidelines) or granted for offsetting additional transport costs (Section 5(70) of the Regional Aid Guidelines). On the basis of the information available, the support for pilot vessels provided for Article 26(3), subparagraph 3, of the Harbour Act would not appear to be limited in this way.

([1]) See the Authority's State Aid Guidelines on national regional aid 2007-2013, point 2(8), fn. 8.

([2]) State aid N 554/06 — Germany, Rolandswerft which concerned the adaptation of a ship lift to lift heavier ships and State aid C-6/06 — Germany, Volkswerft Stralsund (OJ L 151, 13.6.2007, p. 33) also for the extension of a ship lift.

([3]) See the definition of investment aid in Section 4.1.1 of the Regional Aid Guidelines which limit investment aid to initial investment projects, i.e. the setting up or extension of a new establishment, diversification of output of the establishment into new, additional products and a fundamental change in the overall production process. Replacement investment is excluded from that concept, but might qualify as operating aid, see Section 4.1.1(26), last paragraph of the Regional Aid Guidelines.

The Authority will also examine any possibilities to justify this aid granted for safety purposes by virtue of a direct application of Article 61(3)(c) of the EEA Agreement. In this respect, the Icelandic authorities are invited to provide information as to the incentive effect, necessity and proportionality of the support.

Quay installations

The Authority does not exclude that these support measures are not related to ship building, repair and conversion and therefore might not fall under the Shipbuilding Guidelines. However, more information is required in this respect. Again, the aid intensity thresholds laid down in those Guidelines would have to be observed and aid would only be allowed if it can be qualified as investment upgrading or modernisation of existing yards with a view of improving the productivity of existing facilities.

In the event that the Shipbuilding Guidelines do not apply, the measures will be examined under other Guidelines, in particular the Authority's Regional Aid Guidelines in the version applicable at each point in time ([1]).

The Authority doubts whether the support for quay installations can be justified under the Regional Aid Guidelines 1999 or 2007-2013 which in both cases provide for lower aid intensities than those foreseen in the Harbour Act.

Damage compensation

The damage compensation provided for in Article 26(3) subparagraph 3 of the 2003 Harbour Act would not be able to be justified under Article 61(2) as it is no longer limited to natural disaster compensation.

It would therefore have to be assessed under Article 61(3)(c) of the EEA Agreement, in conjunction with the Shipbuilding Guidelines, as far as it concerns measures which fall under the scope of these Guidelines. Again, only if the Shipbuilding Guidelines do not apply, can the support be assessed under the Regional Aid Guidelines. As stated before, the criteria for granting operating aid, as set out in Section 5 thereof (see argumentation above), need to be fulfilled.

Finally, it should be noted that all of the above measures are only granted to publicly owned harbours. The Authority does not see any justification for such a differentiation (see above, Section II-3.1 of this Decision).

With reference to the above assessment, the Authority consequently has doubts as to whether the 2003 Harbour Act can be regarded as compatible with the functioning of the EEA Agreement.

The Authority is therefore in doubt as to whether these measures are compatible with the functioning of the EEA Agreement.

([1]) Section 8(90) of the National Regional Aid Guidelines 2007-2013, published on the Authority's webpage, state that regional aid awarded or to be granted before 2007 will be assessed in accordance with the 1999 Guidelines on national regional aid. The 1999 Guidelines on Regional Aid can be found in OJ L 111, 29.4.1999, p. 46.

4. **Conclusion**

Based on the information submitted by the Icelandic authorities, the Authority cannot exclude the possibility that the 2007 amendments to the Harbour Act and certain aspects of the 2003 Harbour Act constitute aid within the meaning of Article 61(1) of the EEA Agreement.

Furthermore, the Authority has doubts that these measures can be regarded as complying with Article 61(2)(b) or 61(3)(c) of the EEA Agreement, possibly in combination with the requirements laid down in the Shipbuilding Guidelines or the Regional Aid Guidelines or by way of direct application. The Authority thus doubts that the above measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1 (2) of Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question do not constitute aid or are compatible with the functioning of the EEA Agreement.

The Authority notes that were the measures to be identified as new aid within the meaning of Article 1(c) in Part II to Protocol 3 of the Surveillance and Court Agreement, any breach of the standstill operation leads to the classification of the aid as unlawful within the meaning of Article 1(f) of Part II of Protocol 3 to the Surveillance and Court Agreement. Unlawful aid which is not compatible with the EEA State aid provisions is subject to recovery.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, invites the Icelandic authorities to submit their comments on this Decision within **one month** of the date of receipt thereof.

In light of the foregoing considerations, the Authority invites the Icelandic authorities within **one month** of receipt of this decision, to provide all documents, information and data needed for assessment of the compatibility of the above measures,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority finds that as far as breakwater constructions, marking of approach channels, depth, protective installations and dredging are concerned, no State aid is involved as regards support for these projects under Article 24(2)(a), (b) and (c) of the 2003 Harbour Act. The damage compensation clause in 26(3), subparagraph 3, of the 2003 Harbour Act therefore does not involve any State aid within the meaning of Article 61(1) of the EEA Agreement, in so far as it relates to these projects.

Article 2

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement against Iceland regarding the 2007 amendments to the Harbour Act and certain aspects of the 2003 Harbour Act, namely in relation to support for pilot vessels and quay installations.

Article 3

The Icelandic authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3 to the Surveillance and Court Agreement, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 4

The Icelandic authorities are invited to provide within one month from notification of this Decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 5

This Decision is addressed to the Republic of Iceland.

Article 6

Only the English version is authentic.

Done at Brussels, 12 December 2007.

For the EFTA Surveillance Authority

Per SANDERUD	Kristján Andri STEFÁNSSON
President	*College Member*